

THE INTERACTION OF INTERNATIONAL HUMAN RIGHTS LAW WITH THE DOMESTIC JURISDICTIONS. PRESENT PROBLEMS¹

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Resumen: Los sistemas de incorporación del Derecho internacional en las legislaciones internas, así como la ejecutabilidad de las resoluciones internacionales, constituyen los elementos esenciales que regulan el grado de cumplimiento del Derecho internacional de los derechos humanos. En este sentido, las relaciones internacionales están controlando el funcionamiento de estos mecanismos convirtiendo estas normas en una herramienta de prueba de acciones adoptadas como resultados de consideraciones de política exterior. Esta tendencia puede ser apreciada en diferentes aspectos. Por un lado, las diferencias entre sistemas monistas y dualistas están desapareciendo. Por otro lado, diversas enmiendas constitucionales y legales han sido promulgadas con el propósito de evitar el cumplimiento de otros compromisos internacionales. Además, la mayoría de las Constituciones no clarifican el estatus de las normas *jus cogens* de carácter consuetudinario y el criterio que debe prevalecer en caso de que diversas instituciones internacionales mantengan diferencias relativas a un derecho fundamental.

Palabras clave: Derecho internacional, derechos humanos, mecanismos de inserción del Derecho internacional.

Abstract: The incorporation of international law in domestic jurisdictions and the enforceability of international resolutions constitute

¹ This article was started during the author's sojourn as international law visiting professor at the Alba Iulia University.

the key elements that regulate the degree of fulfilment of International Human Rights Law. In this sense, international relations are controlling the operation of these mechanisms converting these norms in an evidence tool of actions adopted as a result of foreign policy considerations. This tendency could be seen in several aspects. On the one hand, the differences between monist and dualist systems are disappearing. On the other hand, in a number of countries legal and constitutional amendments have been promulgated with the propose to avoid the observance of international commitments. Besides, most Constitutions do not clarify the status of customary *jus cogens* norms and the prevailing criterion in case that diverse international institutions maintain differences regarding one fundamental right.

Keywords: International law, human rights, international law incorporation systems.

Sumario: I. Introductory. II. Considerations related to the incorporation of international human rights law in domestic jurisdictions: 1. Monists systems v. dualist systems. 2. Capacity to commit a State in the international sphere. Legislative power v. Executive power. 3. Problems connected with the self-executing character of international human rights norms. 4. Hierarchy position of international treaties in domestic jurisdictions. 5. Universal Jurisdiction. III. The development of enforcement mechanisms by the international institutions specialized in human rights. IV. Conclusions. Bibliography.

I. INTRODUCTORY

The events that preceded and continued the promulgation of the judgement of the United States Supreme Court, in the case *Hadam v Rumsfeld*, have outlined the vulnerability of the international system developed for the protection of human rights, in the present panorama of the international relations.

First, the circumstances that control the incorporation of International Human Rights Law and International Humanitarian Law in domestic jurisdictions are subject to political considerations that, in some cases, ignore the obligation to fulfil their precepts. In this sense, the use of

several terms,¹ has favoured interpretations that place this subject in an international limbo.² In this field is significant the fact, that the United States Supreme Court has considered that there are some principles of the Geneva Conventions from 1949, connected with the respect of the due process, that protect the right to be present during the hearings and the right of defence.³ On the contrary, the proclamation of this judgment has not impaired that in several countries legal norms that restrict the right of *habeas corpus*⁴ has been approved.

Second, a number of appearances before the Human Rights Committee of the United Nations and other similar bodies have revealed the existing distance between the promulgation of an international body of human rights norms and the subordination of its implementation methods to considerations of foreign policy.⁵ The fact that only one international institution has the power to approve coercive measures and that,

¹ As war on terror, with the propose to persuade the audience that anything goes, and that executive power is supreme over legislative or judicial power. See Vorkink, Mark W. and Scheick, Erin M. *The "War on Terror" and the Erosion of the Rule of Law: The U.S. Hearings of the International Court of Justice Eminent Jurist Panel. Human Rights Brief*. Center for Human Rights and Humanitarian Law, A Legal Resource for the International Human Rights Community American University Washington College of Law, 14 No. 1 Hum. Rts. Brief 51 (2006). 2 at 6.

² See *Continuing Controversy regarding Secret U.S. Rendition and Detention Practices*. The American Journal of International Law, Vol. 100, No. 1. (Jan., 2006), pp. 232-236. "Secretary Rice gave a detailed statement...The captured terrorists of the 21st century do not fit easily into traditional systems of criminal or military justice, which were designed for different needs. We have to adapt. Other governments are now also facing this challenge".

³ The Congress Joint Resolution gives to the president of the United States of America the powers to use all necessary and appropriate force against those nations, organizations, or persons he determines planned authorized, committed or order the September 11, 2001 al Qaeda terrorist attacks.

Gabor Rona -legal adviser of the International Committee of the Red Cross- considers that in International Humanitarian Law only exists two situations of conflict: international arm conflict between two states and non international conflict: insurrections and guerrillas that are local in the scope and objectives, Therefore the War on Terror is out scope of the IHL.

⁴ The right of *habeas corpus* is recognized by different international human rights instruments. For instance, article 9.4 of the Intentional Covenant on Civil and Political Rights.

⁵ Human Rights Committee Considers Report of the Human Rights. United Nations Human Rights Committee Press Release, 18 July 2006. *Second, Section 215 of the USA Patriot Act authorized federal prosecutors to issue subpoenas for records about an individual that were held by third parties. The Act had extended to investigators in international terrorism and espionage investigations an authority comparable to a grand jury subpoena power, with the exception that such orders required prior judicial approval. In addition, the Patriot Act specifically provided that recipients of a Section 215 order could consult an attorney and challenge it in court....Similarly, the Terrorist Surveillance Programme was consistent with Article 17 of the Covenant. Under the Programme, the National Security Agency targeted for interception communications between persons in and outside the United States, where there were reasonable grounds to believe that either party was a member of al Qaeda or an affiliated terrorist organization. The "reasonable grounds to believe" standard was a "probable cause" standard of proof. That barred unreasonable searches, but did not require a court order or warrant in all instances. Indeed the Supreme Court had recognized that searches without a warrant were permissible for "special needs" and the Terrorist Surveillance Programme served such a need.*

exceptionally, the resolutions of international tribunals have enforcement powers, demonstrates the vulnerability of the international system developed for the protection of human rights. Hence, this paper deals with two problems: On the one hand, the interrelation between international human rights law and the incorporation methods implement for the fulfilment of its norms in domestic jurisdictions and, on the other hand, the enforcements mechanisms developed by the international human rights institutions.

II. CONSIDERATIONS RELATED TO THE INCORPORATION OF INTERNATIONAL HUMAN RIGHTS LAW IN DOMESTIC JURISDICTIONS

In consideration to the subsidiarity of international law, the international community gives freedom to the States to select the most appropriate incorporation system of its norms in their domestic jurisdictions. Unfortunately, this consideration frequently is only interpreted from a discretionary approach, obviating the obligation to fulfil its norms under penalty of international responsibility. The methods used to reach this purpose are different in nature and most of them are used under a wrong interpretation of the principle of non-inference in domestic affairs. Contextually, the incorporation system of international human rights law in domestic jurisdictions follows separate phases connected with the legal techniques developed by each State.⁶

1. Monists systems v. dualist systems

Initially, this subject was connected with the legal tradition of each state, however, at present, is much influenced by sociopolitical elements. In general terms, for monist systems international law constitutes a unity with domestic law. Therefore, it can be used and alleged by public powers and citizens. On the contrary, dualist systems consider both legal bodies as independent. Consequently, it is necessary the enactment of an internal act to put into effect the international norm. The doctrine considers as examples of monists system the Spanish Constitution of 1978,⁷ the French Constitution of 1958,⁸ the Russian Constitution of 1993,⁹

⁶ Considering the space limitation of this work, this paper will deal only with the sources of international law in general terms.

⁷ See Article 96.1.

⁸ See Article 55.

⁹ See Article 15.4.

the Fundamental Law of Bonn,¹⁰ the Turkish Constitution of 1982,¹¹ the Bolivarian Constitution of 1967,¹² the Romanian Constitution of 1991,¹³ the Honduran Constitution of 1982.¹⁴ In the same way, the jurisprudence of these countries has recognized this principle in numerous resolutions:¹⁵

Les lois d'assentiment du 28 février 1959 et du 8 novembre 1975 énoncent que les actes internationaux visés «sortiront leur pleine et entier effet»... La Cour devra toutefois exécuter son contrôle en tenant compte de ce qu'en l'espèce, il s'agit non d'un acte de souveraineté unilatérale mais d'une norme conventionnelle produisant également des effets de droit en dehors de l'ordre juridique interne.

Most international institutions maintain a contradictory position on this subject. The Human Rights Committee of the United Nations remains indifference in connection with the election of a monist or dualist system, because it considers that the promulgation of constitutional or legal dispositions is an insufficient measure¹⁶. On the contrary, the *Court of Justice of the European Communities*, considering the uniformity required for the application of the *acquis communautaire* and the content of the former article 189 of the European Economic Community treaty, has recognized the direct applicability of the European law in matters of its competence.¹⁷ In the same way, the *Interamerican Court of Human Rights* and the European Court of Human Rights have reaffirmed the direct effect of their resolutions.¹⁸ The increasing importance that have acquired these institutions, have favoured that the United Kingdom, a country with a prominent dualist tradition, has promulgated the Hu-

¹⁰ See Article 25.

¹¹ See Article 90.

¹² See Article 22.

¹³ See Article 11.2.

¹⁴ See Article 16.

¹⁵ *Cour d'Arbitrage – Belgie* Arrêt n° 12/94. 3 February 1994 (Moniteur Belge 1994, p. 6137-6146).

In the same way, see the judgment of the Supreme Court of Venezuela, December 2, 1997, in the appeal registered by Rafael Virgilio Padilla, and the sentence from the Corte Suprema de Justicia de Honduras, of June 29, 1989, in the appeal made by the lawyer Oscar Armando Manzanares.

¹⁶ General Observation n° 3, adopted by the United Nations Human Rights Committee in its 13 sessions period, 1981. HRI7GEN/1/Rev. 1. 29 Jul. 1994.

¹⁷ See *Flamino Costa v. Engel*. Court of Justice of the European Communities, case 6/64 (15-7-1964) and *Amministrazione delle Finanze del Stato v. Simmenthal*. Court of Justice of the European Communities, case 106/77 (9-3-1978).

¹⁸ In relation with the Interamerican Court of Human Rights see case *Bámaca Velásquez*, Resolución de la Corte de 29 de agosto de 1998, Corte I.D.H. (Ser. E) (1998).

In relation with the European Court on Human Rights see *Pekov v. Bulgaria* (Application no. 50358/99). 30 March 2006.

man Rights Act in 1998. This rule transcribes the content of the European Convention on Human Rights, allowing its direct allegation before tribunals and establishing the obligation to be observed by the public powers. Romania¹⁹ and Poland²⁰ have adopted similar process.

The influence of political, economic, social, and cultural circumstances in this process could be appreciated in the change of interpretation suffered by article 6 section 2 of the United States Constitution. Initially, a literal interpretation of this precept – *...all treaties made, or will shall be made, under the Authority of the United States, shall be the supreme Law of the Land and the judges in every state shall be bound thereby; any thing in the Constitution or Laws of any State to the Contrary notwithstanding* – establishes the existence of a monist system. This was the criterion used by the Supreme Court in some of its most prestigious sentences.²¹ On the contrary, at present, the jurisprudence is not homogeneous. In the case, *Thompson v. Oklahoma*,²² the Supreme Court, in connection with the application of the death penalty to minors, and following the criteria established by the chief justice, John Marshall, in 1804, confers to the International Human Rights Law an interpretative value.²³ In the case, *United States v. Alvarez-Machain*,²⁴ in connection with an application of lack of jurisdiction, concerning the kidnap of a criminal by agents of the Drugs Enforcement Administration in Mexico, the criterion used was more restrictive. It was considered that the courts from the United States of America have jurisdiction although the kidnap “*may be... shocking... and.. in violation of general international law principles*”. In the case *Sale v. Haitian Centres Council*,²⁵ concerning the rights of *non-refoulement*,

¹⁹ See Popescu, Corneliu-Liviu. *Protectia internationala a drepturilor Omului*. Bucuresti; Editura: ALL BECK, 2000. 269 at 271.

²⁰ See the senate proposals in relation with the ratification Convention on the Rights of the Child in Kedzia, Zdzislaw. *The Place of Human Rights Treaties in the Polish Legal Order*. European Journal of International Law Vol. 2 (1991) No. 2. 113 at 141.

²¹ In the case *The Paquete Habana* -The Supreme Court of the United States, 175 U.S. 677 (1900)- it was considered that customary international law is *Part of our law, and must be ascertain and administered by courts of justice of appropriate jurisdiction, as often as questions of rights depending upon it are duly presented for their determination*.

²² *Thompson v Oklahoma*, 487 U.S. 815 (1988), Supreme Court of Justice in http://www.oyez.org/cases/1980-1989/1987/1987_86_6169/.

²³ At least three conventions forbid the application to minors of the death penalty, *the Geneva Convention on Protection of Civilians in Wartime, The International Covenant on Civil and Political Rights, a treaty of the United Nations, and the American Convention on Human Rights*.

²⁴ *United States, petitioner v. Humberto Alvarez-Machain*. Supreme Court of the United States, No. 91-712. June 15, 1992 in <http://www.law.cornell.edu/supct/html/91-712.ZD.html>

²⁵ *Sale v. Haitian Centres Council*, Supreme Court of the United States. Inc., 113 S.Ct. 2549 (21 June 1993).

the Supreme Court decided that asylum applicants were not returnees because they had never been in the territory of the United States, but they have been merely put back. This decision was taken against the previous criterion of the Department of State and the Department of Justice, the Court of Appeal and the opinion of the United Nations High Commissioner for Refugees in his intervention as *Amicus Curiae*.²⁶ Finally, in the case *Breard v. Greene*,²⁷ the Supreme Court resolved to ignore a request from the International Court of Justice in relation with the adjournment of the execution of a Paraguayan citizen.

Two circumstances have favoured this broad interpretation of the supremacy clause. First, this precept has been considered exclusively in connection with the acts of the states.²⁸ This situation has relegated International Law to a secondary place in relation to the behaviour of federal institutions. In this order, if a conflict exists between the Constitution and the International Law, the first must prevail.²⁹ On the other hand, the Congress can overrule the effects of an international treaty by the promulgation of a subsequent act.³⁰ These premises have favoured that different scholars consider that the authority of federal judges to interpret and apply customary international law, without the existence of

²⁶ The Inter American Commission of Human Rights, one year later, published a report where the consequences of the not consideration of the Convention relating to the Status of Refugees were described. *Later many of the repatriated refugees were arrested at home. Others never made it home and were arrested at pre-established roadblocks. Several were found shot to death, and some were beaten in public by the military, which forced people at gunpoint to identify the repatriated Haitians. Others were taken to the national penitentiary where they were beaten daily and not fed, and some were tortured to death in prison. Detainees were told by at least one prison guard that they were being tortured for having fled Haiti, and that others would suffer the same fate. Others were informed that a local judge had issued arrest warrants for repatriated refugees because they had left Haiti and criticized the military. En Cassel, Doug. Bringing Human Rights Home. International Law In The United States Supreme Court. First Monday Program: Northwestern University School of Law; October 5th, 1998. 6 p. [Date of search: March, 2007]. Available in: <http://www.law.northwestern.edu/depts/clinic/ihr/docs/1mon.pdf>.*

²⁷ See *Bread v. Greene* in *Race and Ethnic Ancestry Law Journal* 5.69 (June 1999). [Date of search: march, 2007] Available in <http://www.jacksonlewis.com/attorneys/vattorney.cfm?aid=1010>.

²⁸ Justice Joseph Story noted in his 1833 exposition of the Constitution. *It is notorious, that treaty stipulations (especially those of the treaty of peace of 1783) were grossly disregarded by the states under the confederation. They were deemed by the states, not as laws, but like requisitions, of mere moral obligation, and dependent upon the good will of the states for their execution...*

²⁹ *Reid v. Covert*, U.S. Supreme Court 354 U.S. 1, 1957; *Geoffrey v. Riggs*, U.S. Supreme Court 133 258 (1890), in Reed, J.W.R. *Political Review of the European Court of Justice and its Jurisprudence*. NYU School of Law, 1995. Jean Monnet Center. [Date of search : March, 2007] Available in: <http://www.jeanmonnetprogram.org/papers/95/9513ind.html>- and Joyner, Daniel H. A normative model for the integration of customary international law into United States Law. Cited: 11 Duke J. of Comp. & Int'l L. 133.

³⁰ *Bread v. Greene*. *Race and Ethnic Ancestry Law Journal* 5.69 (June 1999).

a previous legislative transposition, could be considered pretentious for the American legal system.³¹

In application of doctrine of separation of powers, that limits internal interferences,³² the president acts as the sole body of foreign policy -*Act of State Doctrine*-.³³ In this order, he can cancel an international compromise adopted by his country. An example of this situation is provided by the withdrawal from the Mutual Defence Treaty between the United States and Taiwan, although the Supreme Court has not reached a final decision on the merits. On the contrary, the German Constitutional Federal Court has developed a different criterion in the case *J. Abr. Frowein: Solange II*.³⁴

Probably the most important change of approach took place when the Senate, in June 1981, dealt with the rather unimportant and now dismantled European organisation called "Eurocontrol". In this decision the Court pronounced that it is the Federal Constitutional Court's task to make sure that violations of public international law which could incur the international responsibility of the Federal Republic of Germany should be avoided or redressed.

These arguments underline the existence of several legal contradictions. For instance, the legal system of the United States of America is based in the principle of *limit powers*. This notion forbids to rule outside its constitutional competences. In this context, federal powers could assume international obligations that affect issues considered as competences of the states. An example could be the right to live and the restrictions to the application of the death penalty.

The French case is also contradictory in two fields. As it has been already mentioned, its Constitution apparently establishes a monist sys-

³¹ See Daniel H. Joyner. A normative model for the integration of customary international law into United States Law. Cited: 11 Duke J. of Comp. & Int'l L. 133.

³² It is necessary a majority of two thirds of the senate members for the ratification of an international treaty.

³³ Delson, Robert, *The act of state doctrine judicial deference or abstention?*. The American Journal of International Law, Vol. 66, No. 1. (Jan., 1972), 82 at 93. Available in: <http://www.jstor.org/view/00029300/di981763/98p0497p0>. *The following discussion of the historical development of the act of state doctrine in the United States suggests that the purpose of the doctrine is not to secure judicial deference to the Executive Branch, i.e., to compel the courts to follow all Executive suggestions with reference to the propriety of examining the validity of foreign sovereign acts, but rather to assure that U.S. foreign relations remain the exclusive responsibility of the Executive Branch, and that the Executive may not shift such responsibility to the courts. Hence, the courts should abstain from passing upon the validity of foreign sovereign acts notwithstanding State Department suggestions to the contrary. The only exception to this rule, the "Bernstein exception," is more apparent than real, as will appear below.*

³⁴ *J. Abr. Frowein: Solange II*. Constitutional Federal Court of Germany (25 C.M.L. Rev 201 (1988).

tem.³⁵ On the contrary, its judiciary,³⁶ traditionally, has been divergent to make interpretations regarding international law. The minister of foreign affairs through the *prejudicial question* has assumed this task. However, this situation is changing as a result the case *Nicolo*.³⁷

It should be added that the principle itself of reference to the Minister for Foreign Affairs, which has the double disadvantage of entrusting the interpretation of an international agreement to one of its signatories and of putting the State in the position of both judge and party in a good many causes, is now the subject of considerable dispute and the possibility cannot be ruled out that one day soon it will be abandoned.

In the same way, the French constitutional reference concerning the reciprocity is in direct contradiction with several international human rights treaties. Mainly, because these instruments consider human beings and not States their beneficiaries.³⁸

Commonwealth countries could be considered as an example of dualists systems. Contrary to the tradition followed by other nations, their Constitutions remain silence in connection with the incorporation system of International Law in their domestic jurisdictions. For this reason, the judiciary has assumed this task.³⁹ The Australian sentence in the case *Kowarta v. Bjelke Peterson*⁴⁰ is representative of this principle.

³⁵ In the same way see the reference made to the reciprocity, with regard to the enforcement of human rights treaties whose addressees are the citizens and not the States.

³⁶ In relation with the possible conflicts of interpretation that could arise, between the *Cour de Cassation* and the *Constitutional Council*, with regard to human rights, the practice has demonstrated the inexistence of contradictions.

³⁷ *Nicolo Case*, Opinion of the *Commissaire du gouvernement* (Raoul Georges). Conseil d'Etat. 20 October 1990. 1989 [1990] 1 CMLR 173.

³⁸ In the sphere of the EU reciprocity is not applicable. See *Cafés Jacques: Administration des Douanes v. Société "Cafés Jacques Vabre"* cie Cour de Cassation [1975] 2 CMLR 336.

³⁹ The *Common Law* has used the criteria of the case *R. v. Keyn (Franconia)* 1876 LR 2 Ex D 63. UK. See Alexandrowicz, Charles Henry. *International Law in the Municipal Sphere according to Australian Decisions*. Oxford University Press. The International and Comparative Law Quarterly, Vol. 13, No. 1. (Jan., 1964), 78 at 95. *English and Commonwealth lawyers have considered the relevant problems against the background of the Blackstonian doctrine according to which the law of nations is part of the law of the land, but no consensus of opinion has prevailed as to the ultimate validity of the doctrine since some writers have proposed to treat international law as a source of municipal law instead of having it "incorporated" in the latter... Franconia case (1876) the court stated that the territory of England ends at the low water mark and that jurisdiction could not be assumed over foreign nationals in territorial waters. The court in this case abandoned (presumably) 23 the Blackstonian doctrine and made the transformation of international customary law into municipal law by legislation essential for the application of the former within the sphere of the latter.*

See *Re Admission to Practice of Fitzgerald* (1997) Supreme Court of Belize. 2 Carib LB 99 quoted in Rose-Marie Belle Antoine. *Commonwealth Caribbean Law and Legal System*. Commonwealth Caribbean Series. London: Cavendish Publishing Limited, 2000 p. 154.

⁴⁰ *Koowarta v Bjelke Peterson*. 153 C.L.R 168, 1981. Supreme Court of Australia.

It is a well-settled principle of the Common Law that a treaty not terminating a state of war has no legal effect upon the rights and duties of Australian citizens and is not incorporated into Australian law on its ratification by Australia. As Barwick CJ and Gibbs J observed in *Bradley v. The Commonwealth* [4], the approval by the Commonwealth Parliament of the Charter of the United Nations in the Charter of the United Nations Act 1945 (Cth) did not incorporate the provisions of the Charter into Australian law. To achieve this result the provisions have to be enacted as part of our domestic law, whether by Commonwealth or State statute.

From its origins, the application of International Human Rights Law, has raised several problems in commonwealth countries. On the one hand, the Common Law, for centuries has represented a supranational body of norms that could be applied in different nations.⁴¹ The possibility to enforce directly international norms threatened the creative powers of British judges. Under this premise, the first period of the application of International Human Rights Law in these States, was marked by the *frozen law* doctrine.⁴² The point of change of this situation was represented by the influence of the European Court of Human Rights in the jurisprudence of the Judicial Committee of the Privy Council -especially by the use of the necessary argumentations to restrict the application of the death penalty-.⁴³ Paradoxically, this situation has favoured the quest of new judicial mechanisms that pursued the inapplicability of international human rights norms. The strategies used to achieve this goal were, the withdrawal from international instruments in this field,⁴⁴ the pro-

⁴¹ This duality of supranational legal systems, that could have contradictions between their norms, was the cause to relegate International Human Rights Law to a secondary position. The doctrine considered that this international body of norms came from the Common Law.

⁴² See Barnett, Lloyd. *Human Rights and the Machinery of Justice Caribbean Judicial Approach to the Constitutional and Conventional Human Rights Provisions*. in Seminar for Caribbean Judicial Officers on International Human Rights Norms and the Judicial Function. San José: IIHR – University of the West Indies, 1995. p. 45: *to a great extent constitutional guarantees of human rights in the Caribbean had been in danger of atrophy by reason of judicial predilection for "the frozen law doctrines" enunciated in the celebrated Nasralla Case, in which Lord Devlin stated that the Bill of Rights provisions of the Jamaican Constitution proceed upon the presumption that the fundamental rights which it covers are already (at independence) "secured to the people of Jamaica by existing law..."*

⁴³ In relation with the inhuman treatment that supposes the unjustified delay in the dead row see *Mejia v. Guevara*. Sentence of the Belize Supreme Court, 11 June 2001. in Conteh, Abdulai O. *Implementation of International Human Rights Obligations and Respect for International Standards in the Inter-American System of the Segment: Implementation Through Judicial, Quasi-judicial and other Supervisory Mechanisms C.J.* in Belize Law Review, Attorney General's Ministry. January - June 2003, p. 6.

⁴⁴ In 1998 Jamaica denounced the protocol of the ICCPR with regard to the decisions of the United Nations Human Rights Committee. The same year, Trinidad Tobago withdrawn from the Inter Ameri-

mulgation of constitutional amendments that assure the effective application of the capital punishment,⁴⁵ and the replacement of the Judicial Committee of the Privy Council by the Caribbean Court of Justice, as the last judicial remedy.

With the intention to clarify these concepts and considering the cultural identity of each country,⁴⁶ judges from commonwealth nations adopted the Bangalore Principles. This document recognizes the primacy of domestic law in the judicial activity but, at the same time, ensures the right of direct allegation, of the international human rights law, before national courts and the obligation of States to fulfil their international compromises.

However, where national law is clear and inconsistent with the international obligations of the State concerned in common law countries the national court is obliged to give effect to national law. In such cases the court should draw such inconsistency to the attention of the appropriate authorities since the supremacy of national law in no way mitigates a breach of an international legal obligation, which is undertaken by a country.⁴⁷

can Convention on Human Rights, presumably as a consequence of the impact of the resolutions of the Inter American Court of Human Rights in relation with the death penalty.

⁴⁵ See Judicial Colloquium on the Domestic Application of International Human Rights Norms celebrated in Bangalore from 27 to 30 of December of 1998 quoted in Conteh, Abdulai O., *Implementation of International Human Rights Obligations and Respect for International Standards in the Inter-American System of the Segment: Implementation Through Judicial, Quasi-judicial and other Supervisory Mechanisms* C.J. in Belize Law Review, Attorney General's Ministry. January - June 2003, p. 10. *It is matter of public concern that some legislature pass amendments to their constitutions or laws designated to erode or diminish fundamental rights and freedoms as interpreted and applied by national courts and by international human rights fora. This practice should not be resorted to and no amendment should be made which would destroy or impair the essential features of democratic societies governed by the rule of law.*

See the Fifth Amendment to the Belizean Constitution published in the "Gazette" on December, 7th 2002. 2. *The following shall not be held to be inconsistent with or in contravention of this section or anything in this Constitution or any other Law: The imposition of a mandatory sentence of death or the execution of such a sentence.*

Any delay in executing a sentence of death imposed upon a person in respect of a criminal offence under the Laws of Belize of which has the person been convicted;

The holding of any person in prison or the lawful place detention pending execution of a sentence of death impose upon that person as provided in coming into the force the Belize Constitution (Fifth Amendment) Act 2002. Were prescribed by or under the Prisons Act them in force. Were otherwise practice in Belize in relation persons so in prison or detained.

⁴⁶ See Conclusions of Judicial Colloquia and other meetings on the Domestic Application of International Human Rights Norms and on Government under the Law 1988-1992. Concluding statement of the Judicial Colloquium held in Bangalore, India from 24-26 February 1988: Bangalore Principles. Chairman's concluding statement. Developing Human Rights Jurisprudence: *While it is desirable for the norms contained in the international human rights instruments to be still more widely recognised and applied by national courts, this process must take fully into account local laws, traditions, circumstances and needs.*

⁴⁷ Ibid.

The British parliament recognizes an especial case in sections 2.1 and 2 of the European Communities Act. In this sense, it is reaffirmed the direct application and superior hierarchy of these norms without any further domestic enactment. However, the jurisprudence in the case *Macarthy's v. Smith*⁴⁸ specified that the parliament have the power, in a subsequent act, to clarify that domestic law prevails over the European Communities' Law.

2. Capacity to commit a State in the international sphere. Legislative power v. Executive power

One of the principal causes of confusion about the incorporation process of international norms in domestic jurisdictions lies in the functions developed by the executive and legislative powers. Traditionally, the parliaments have been the guardians of sovereignty with exclusive powers to create rights and obligations for its citizens. The fact that International Human Rights Law has a direct effect in individuals, despite their nationality, creates two possible sceneries:

i. Systems where the power to commit or release a state from its international obligations lies, exclusively, in the executive power. As a principle, it is considered that foreign policy in an exclusive competence of the executive bodies.⁴⁹ Legislative activity is only necessary when international instruments affect certain competences - The Spanish constitution of 1978 established a broad enumeration of these subjects: *a) Treaties of a political nature, b) Treaties or agreements of a military nature, c) Treaties or agreements affecting the territorial integrity of the State or the fundamental rights and duties established under Part 1, d) Treaties or agreements which imply financial liabilities for the Public Treasury, e) Treaties or agreements which involve amendment or repeal of some law or require legislative measures for their execution*-. On the contrary, some legal traditions still recognize privileges in favour of the executive power; this is the case of the *Ancient Royal Prerogative* in the United Kingdom. This doctrine considers international relations -including the power to celebrate treaties- as an authority of the crown that delegates in their ministries without an approval from the parliament.⁵⁰ Considering that, at present, the legal systems tend to bring together concepts and process, in this case, the *Pu-*

⁴⁸ *McCarthy Limited v. Wendy Smith*, English Court of Appeal Case 129/79 [1980] ECJ 1289.

⁴⁹ Article 7.2 of the Vienna Convention on the Law of Treaties.

⁵⁰ The supremacy of the parliament explains the existence of a dualist system.

blic Administration Select Committee of the Common House,⁵¹ considered that the local legislative transposition was only necessary when there is a contradiction between a treaty and a rule in force.

As the prerogative is a residual power it cannot be used to amend the general law. This is of particular interest in relation to international treaties. Although the Executive can commit the United Kingdom to obligations under international law, if a change to domestic law is required, it will only take effect if Parliament passes the necessary legislation.

In same new democratic societies, the profusion of constitutional and legal amendments has discredited the role of the parliamentary chambers. This situation have been used by the executive powers to make reforms that make up and disturb the *checks and balances*, assuming competences of other powers. The promulgation of the *United Nations Act*, in Belize, is representative of this situation because it concentrates in the executive the power to ratify international agreements by a statutory act approved by the minister of foreign affairs. At the same time, in this case, the international treaty remains above any other internal norm.⁵²

The delegation of the legislative in the executive with the propose to ratify international instruments,⁵³ is other mechanism that could be subsumable in this paragraph. Finally, in connection with the withdrawal from international instruments it could be mention again the case of the United States of America.

ii. Systems where the power to commit in the international sphere a State, require a legislative intervention through majorities less qualifies that others necessary for the domestic development of fundamental rights. In juridical terms, this situation represents a legal fraud. Unfortunately, it is used frequently under wrong interpretations of constitutional concepts. For example, in Romania is established that some international treaties

⁵¹ Press Notice No.19 Session 2002-03. PASC publishes Government Defense of its sweeping prerogative powers.

⁵² Published in the Gacette on March 2th, 2002. United Nations Act. No. 1 de 2002. "Where Belize ratifies a United Nation Convention, such Convention shall be submitted to the National Assembly within thirty days of its ratification and the National Assembly may pass a law to give effect to it or, where appropriate, the minister may immediately by Order Publisher in the Gazette as a statutory instrument, make such provisions as appear to him necessary or expedient for giving effect to such Convention within Belize and every such Order shall have effect notwithstanding anything to the contrary contained in any other rule, regulation or instrument."

⁵³ Popescu, Corneliu-Liviu. *Protectia internationala a drepturilor Omului* (Bucuresti: ALL BECK, 2000) p. 258. "Constitutionalitatea delegarii legislative si a interventiei ordonantei in domeniul ratificarii tratatelor internationale in general a fost statuata in jurisprudenta Curtii Constitutionale si este o constanta in practica normativa a Parlamentului si a Guvernului".

must be adopted by an *organic act*. The true is that none treaty has been ratified through this process.⁵⁴ Article 93 of the Spanish Constitution of 1978 shows a similar situation.⁵⁵

3. Problems connected with the self-executing character of international human rights norms

Both in the dualist system and in the monist system subsist a confusion regarding the self-executing character of the International Human Rights norms. For some scholars as René Provost,⁵⁶ most international norms in this area are self-executing, while for other authors, as Lord Denning,⁵⁷ they are not. The doctrine compel that these norms should establish rights in a clear and precise manner, besides they should have the necessary elements required by the judge to be applied in a particular case, without the support of a legislative or statutory norm.⁵⁸ The fact that human rights treaties recognise subjective rights to persons favours its self-executing character. This statement fits with the concept of civil and political rights,⁵⁹ on the contrary, in relation with social, economical and cultural rights arise some doubts. In this sense, the regional systems established for the protection of human rights have developed weak mechanisms to enforce its resolutions.⁶⁰ This programmatic character has favoured that some authors consider them as non-enforceable because they are merely obligations of best intents. This argument initially could have had a legal base, however, at present, it has lost applicability in view

⁵⁴ Ibid. p 257. "*Afel, cu caracter general, tratatele internationale se retifica prin lege ordinara, cu exceptia tratatelor internationale care au obiect relatii sociale pe care Constitutia Romaniei le rezerva legii organice, acestea trebuind sa fie retificate prin lege organica...In practica de pana acum. Insa, in mod neconstitutional, tratatele internationale in materia drepturilor omului, indiferente de continutul lor, au fost ratificate prin lege ordinara, iar un prin lege organica*".

⁵⁵ Article 81. However, in relation with the ratification of international treaties, two types of majorities are required, an organic law for the instruments adopted in the scope of article 93 and an ordinary act for the other treaties adopted according to article 94.

⁵⁶ Provost, René. *International Human Rights and Humanitarian Law* (UK: Cambridge University Press, 2002) p. 23

⁵⁷ Quoted by Jorg Polakiewicz. The applications of the European Convention on Human Rights in Domestic Law in Alston, Philip and Steiner, Henry J. *International Human Rights in Context. Law, Politics, Morals* (United States: Oxford University Press, 2^a ed. 2000) p. 1002: *The convention is drafted in a style very different from the way which we are used to in legislation. It contains wide general statements of principle. They are apt to lead to much difficulty in application because they give rise to much uncertainty...*

⁵⁸ Instituto Interamericano de Derechos Humanos. *Guía sobre la aplicación del Derecho Internacional en la Jurisdicción Interna*. San José, 1996 204 p. 50.

⁵⁹ Mainly, because it is considered that these norms are obligations of result.

⁶⁰ This difference could be appreciated in two instruments of the European Council: The European Human Rights Convention and the European Social Charter.

of the consolidation of a juridical body of secondary law developed by some international institutions. Paradoxically, it has been in the framework of the African Charter on Human and Peoples Rights, where, for the first time, it was recognised the self-executing character of these norms. Specially, in the case *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria (SERAC)*,⁶¹ was recognised the responsibility of the Nigerian Government because a factory violated the rights to a healthy environment.

One of the principal problems of the self-executing character of the international norms lies in the broad discretionary of domestic courts when they have to decide about the content of these norms. The Supreme Court of the State of California, in the case *Sei Fuji v. The state of California* established the necessity to respect some elements. First, it combines the use of a theological and literal criterion without specifying which one should prevail in case of conflict.⁶² Second, it makes a dangerous ligature between international law and reciprocity.⁶³ Considering these aspects, it could be affirmed that the self-executing character of international human rights norms has an important similarity with the causes that promoted the creation of the dualist systems. Consequently, this concept symbolizes the method used by some monist legal systems in accordance with the reasons that motivated the creation of the dualist systems.

4. Hierarchy position of international treaties in domestic jurisdictions

Although this issue has been dealt in other paragraphs, the importance that has acquired recently makes convenient to dedicate a separate study. In this order, the comparative law has established the existence of five typologies:

⁶¹ *Social and Economic Rights Action Centre (SERAC) and The Centre for Economic and Social Rights (CESR) v. Nigeria*, (2001), Communication No. 155/96, (African Commission on Human and Peoples' Rights), online: University of Minnesota Human Rights Library.

⁶² *SEI FUJII*, Appellant, v. The State of California, Respondent, L. A. No. 21149, Supreme Court of California, 38 Cal. 2d 718; 242 P.2d 617; 1952 Cal. LEXIS 221, April 17, 1952. "In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse may be had to the circumstances surrounding its execution. In order for a treaty provision to be operative without the aid of implementing legislation and to have the force and effect of a statute, it must appear that the framers of the treaty intended to prescribe a rule that, standing alone, would be enforceable in the courts..."

⁶³ *Ibid.* "Treaty provisions are enforced without implementing legislation where they prescribe in detail the rules governing rights and obligations of individuals or specifically provide that citizens of one nation shall have the same rights while in the other country as are enjoyed by that country's own citizens".

i. The first group is composed by the countries that considered that International Law is above their own Constitution. One of the few examples that it could be mentioned in this category is article 91.3 of the Dutch Constitution,⁶⁴ whenever a literal interpretation is made. In any case, the intervention of the parliamentary chamber is ensured, therefore this process respect the national sovereignty.

Sometimes the supraconstitutional value is recognized in view of the principle of more favourable norm.⁶⁵ This has been the interpretation of the Supreme Court of Costa Rica⁶⁶ in different resolutions.⁶⁷

“...El artículo 48 Constitucional tiene norma especial para lo que se refiere a derechos humanos, otorgándoles una fuerza normativa del propio nivel constitucional... Los instrumentos de derechos humanos vigentes en Costa Rica, tienen no solamente un valor similar a la Constitución Política, sino que en la medida en que otorguen mayores derechos o garantías a las personas, privan por sobre la Constitución”.

Some authors consider that this doctrine is based in the progressivity of International Human Rights Law. However, it is important to remember that not all legal systems recognize this principle in their domestic jurisdiction.⁶⁸

In some cases, the supraconstitutional value has been recognized in regional frameworks. For example, The *Federal Constitutional Court of Germany*, in the case *J. Abr. Frowein: Solange II*, stated the interpretative supremacy of the *European Human Rights Court of Justice*, in issues of its competence.

ii. The second group is composed by the countries that put on the same level international norms and their Constitution. This situation is only possible from a formal point of view, because in case of conflict always one of the two national legal orders must prevail. As an example it could be mentioned article 23 of the Venezuelan Constitution, as long as the International Law has not established a more favourable norm.

iii. The third group is composed by the countries that concede to International Law a supralegal value. In numerous situations, this group is recognised by a norm that establishes that in case that a treaty entry in

⁶⁴ Any provisions of a treaty that conflict with the Constitution or which lead to conflicts with it may be approved by the Chambers of the Parliament only if at least two-thirds of the votes cast are in favor.

⁶⁵ See Ayala Corao, Carlos M. *Las Consecuencias de la Jerarquía Constitucional de los Tratados relativos a Derechos Humanos*. Ex Presidente de la Comisión Interamericana de Derecho. 1 at 39.

⁶⁶ Ibid. p.7. Corte Suprema de Costa Rica, sentence No.2313-95.

⁶⁷ Judgment No.3435-92 and its explanation No.5759-93.

⁶⁸ Ibid. p. 16.

contradiction with an international norm, it will be necessary to previously modify the Constitution to make it enforceable -the paradox is that it set up a monist mechanism for the legislative norms and a dualist system for the Constitution-.

For instance, it could be mention article 95 of the Spanish Constitution.⁶⁹ In this order, the Constitutional Court of Spain states that *con independencia de la clase de tratado internacional que sea, incluso aquellos que impliquen una cesión de potestades constitucionales, el principio de jerarquía constitucional rige y requiere la previa modificación constitucional*.⁷⁰ The Constitutional Federal Court from Germany, in connection with the adhesion to the Maastricht Treaty, used a similar criterion.⁷¹

In this context, a special situation refers to the relation between the Constitution and the consuetudinary *jus cogens* norms. The inexistence of a direct act of consent places this kind of norms under the Constitution level. Considering this, in case of conflict, the judiciary should have to ignore its content and give preference to the Constitution. However, the object protected by this kind of norms, as well as is general acceptance, promote the development of interpretations that places these norms in a separate position of the national hierarchy of international norms.

In other cases, same problems arise in relation with the differentiation between international treaties in general, and international human rights treaties.⁷² In this order, there are few Constitutions that confer a

⁶⁹ *La celebración de un tratado internacional que contenga estipulaciones contrarias a la Constitución exigirá la previa revisión constitucional. El Gobierno o cualquiera de las Cámaras puede requerir al Tribunal Constitucional para que declare si existe o no esa contradicción.*

⁷⁰ Declaration of July 1, 1992, (Declaration 132 bis/1992).

⁷¹ Decision of the German Constitutional Court on Maastricht. Constitutional Court 12 October 1994 193 33 I.L.M. 388 (1994). *"The functions of the European Union and the powers granted for its realization are standardised by the Treaty in a manner sufficiently foreseeable to ensure that the principle of limited individual powers is observed, that no exclusive competence for jurisdictional conflicts is established for the European Union, and that the assertion of other functions and powers by the European Union and the European Communities is dependent upon amendments and supplements to the Treaty and therefore to the consent of the national parliaments (II.2)."*

⁷² In connection with the nature of international human rights treaties the Inter American Court of Justice has established, *"La Corte debe enfatizar, sin embargo, que los tratados modernos sobre derechos humanos, en general, y, en particular, la Convención Americana, no son tratados multilaterales de tipo tradicional, concluidos en función de un intercambio recíproco de derechos, para el beneficio mutuo de los Estados contratantes. Su objeto y fin son la protección de los derechos fundamentales de los seres humanos, independientemente de su nacionalidad, tanto frente a su propio Estado como frente a los otros Estados contratantes. Al aprobar estos tratados sobre derechos humanos, los Estados se someten a un orden legal dentro del cual ellos, por el bien común, asumen varias obligaciones, no en relación con otros Estados, sino hacia los individuos bajo su jurisdicción"*, en El Efecto de las Reservas sobre la Entrada en Vigencia de la Convención Americana sobre Derechos Humanos. Corte IDH. Opinión Consultiva OC-2/82 del 24 de septiembre de 1982. Serie A No. 2.

superior value to human rights treaties.⁷³ The reason for this differentiation lies in the relation between Constitutional Law and International Human Rights Law. In some cases, several Constitutions turn to an interpretative preference⁷⁴ of the constitutional norms related to human rights.⁷⁵ These cases could be considered as a previous phase for the recognition of the superiority of this international body of norms.⁷⁶ Finally, the Belgian *Cour de Cassation* recognises that the principle that a subsequent act overrule a previous act, can not be applied in the case of international treaties.⁷⁷ The reason is that *the rule established by a treaty shall prevail... the primacy of the treaty results from the very nature of International treaty law*.

iv. The four group is composed by the countries that situated on the same level International Law and domestic Laws. This category, again, is more formal than real since in case of conflict one of both legal systems must prevail.

v. The fifth group is composed by the countries that give an inferior value to International Law with regard to their domestic laws. This system is mainly used by the Anglo-American countries, where the parliament is deep rooted in the principle of national sovereignty. In general terms, the main concept is that a subsequent act could overrule an international treaty, although the State could incur in international responsibility.

In the same way, several authors⁷⁸ add in this group a general law provision attached to several treaties⁷⁹. It refers when the domestic law contains interpretations, or more favourable norms, for the human been. In this case, the national legislation should prevail over the international norms. In proper terms, the international norm establishes this possibility; therefore, the existence of this hypothesis does not look like feasible from a material point of view.

⁷³ Article 75 of the Argentinan Constitution.

⁷⁴ This method has been used frequently in actions connected with the constitutional control of laws.

⁷⁵ Article 10.2 of the Spanish Constitution.

⁷⁶ In relation with the European Union Law See *Amministrazione delle Finanze dello Stato v Simmenthal*, Court of Justice of the European Communities. case 106/77 [1978] ECR 629.

⁷⁷ *Minister for Economic Affairs v. Fromagerie Franco-Suisse 'Le Ski'*. Belgian Cour de Cassation, First Chamber [1972] CMLR 330.

⁷⁸ Popescu, Corneliu-Liviu. *Protectia internationala a drepturilor Omului* (Bucuresti; ALL BECK, 2000) p 14. *Prin urmare, din corelarea principiilor superioritatii normelor internationale in materia drepturilor omului si subsidiaritatii lor in raport cu dreptul intern, rezulta solutia conform careia, in caz de conflict intre o norma internationala privind drepturile omului si o norma juridica interna, se aplica intotdeauna, atat la nivel international, cat si la nivel intern, norma mai favorabila, indiferent ca acestea este cea internationala sau cea interna.*

⁷⁹ This principle is incorporated in the Inter-american Convention, Article 29.b.

5. Universal Jurisdiction

The main peculiarity of the universal jurisdiction lies in the nature of the crime developed beyond the traditional concepts of territoriality *-rationi loci-*, nationality⁸⁰ and protection of the State interest. In this sense, from a material point of view, universal jurisdiction has been developed in two fields: the persecution by international courts and its application by domestic jurisdictions.⁸¹ This situation is the result, in words of the *United Nations High Commissioner for Human Rights*, of the sad reality is that states often fail to investigate and prosecute serious human rights abuses.

Therefore, its object has progressed from the harassment of war crimes, piracy and slave trade to the present regulation. From the Second World War, several initiatives have been developed with the purpose to condemn this kind of behaviour.⁸² Unfortunately, most of them require more uniformity. At present, the classification established in section five of the Statute of the International Criminal Court could be used as reference -The crime of genocide, crimes against humanity, war crimes and the crime of aggression-. The common element of these four typologies consists in its systematic application. In this sense, the development in domestic legislations of the universal jurisdiction, will also favour the repression of these behaviours when they are not committed in a generalize manner, under the traditional criteria of competence.

The relation between the international and internal spheres of the universal jurisdiction is regulated by the subsidiarity of the second with regard to the first.⁸³ The justification of this method lies in the global strategy of the United Nations to strengthen local capacities. Under this consideration, several initiatives that implement this competence has

⁸⁰ Of the victim or of the presumed criminal.

⁸¹ *Eichmann v. Attorney-General of Israel*. Supreme Court of Israel (1962) 136 I.L.R. 277; *Demjanjuk v. Petrovsky*, 776 F.2d 571, at 582, reprinted in 79 ILR 538, at 545; *Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie*, 78 International Law Report 125 (Cour de Cassation, France, 1985); and *R. v. Finta*, (24 March 1994) Canada, 1 SCR 701, *Dissenting opinion by Justice LaForest*, in *State consent regime v. Universal jurisdiction*, ICRC. 10-12-1997.

⁸² With doctrinal differences, the Tribunals of Nuremberg and Tokyo. The International Criminal Court for the former Yugoslavia, 1993, and The International Criminal Court for Ruanda, 1994.

⁸³ See Collantes, José Luis. *La Corte Penal Internacional. El impacto del Estatuto de Roma en la jurisdicción sobre crímenes internacionales*. Revista electrónica de ciencia Penal y criminología. Universidad de Granada. Artículos REPC 04-07 (2002). 23 p. "A diferencia de los Estatutos del TIPY y del TIPR, que establecen jurisdicciones simultáneas con los tribunales nacionales, el Preámbulo y el art.1 del estatuto de la CPI prevén una jurisdicción con carácter complementario a la justicia penal de los Estados".

been developed -as the creation of mix tribunals⁸⁴ or the approval of international agreements that compel states to adopt domestic laws-⁸⁵, with varied results. For these reasons, the challenges confronted by this process are diverse:

i. The absence of a connection criteria favours that contradictory judicial resolutions, concerning one case, could be reached in diverse countries.⁸⁶ In this sense, it should be borne in mind the impossibility to start before two international institutions a legal action, as well as the Roman aphorisms *non bis in idem* and *res judicata*.

ii. From the point of view of a judicial technique, the main problem arises in relation with the principles of legality and legal description that rule in criminal international law. In this sense, several states still have not developed a body of norms in connection with the universal jurisdiction. The fact that the judiciary has been in charge of the recognition of this concept produces several problems. In the case, *Hissène Habré*,⁸⁷ the *Court of Appellation* from Dakar considered that -although its country has developed a Constitutional monist system,⁸⁸ its members of the Convention Against Torture and Other Inhuman and Degrading Treatments⁸⁹ and the first report delivered to the committee⁹⁰ recognizes the existence of this kind of competence in Senegal⁹¹- it had not jurisdiction

⁸⁴ It could be mentioned the efforts made by the United Nations to prosecute the former leaders of the *Khmer Rouge*, in Cambodia, and the configuration of a mix tribunal in East Timor. From this perspective the Sierra Leone Tribunal could be considered as the most successful experience.

⁸⁵ See Amnesty International. *Universal Jurisdiction* in <http://web.amnesty.org/pages/uj-index-eng> Amnesty International found that over 125 states had laws providing for universal jurisdiction over certain conduct amounting to at least one of the crimes (for the full study see *Universal Jurisdiction: The duty of states to enact and enforce legislation*). However, no state has universal jurisdiction for all the crimes and many of the existing laws are flawed.

In the United Kingdom, Section 134 of the Criminal Justice Act 1988, in Spain, article 23.4 of the Ley Orgánica del Poder Judicial, in the United States of America, Section 2340A Title 18 of the United States Code. For more information see <http://web.amnesty.org/library/index/engior530132001?OpenDocument>.

⁸⁶ The former dictator from Chad, Hissène Habré, has been prosecuted by the Senegal Courts as well as by the Belgian Courts. See Salàs Darrocha, Josep Tomàs. *Corte Penal Internacional y Audiencia Nacional: Delimitaciones Competenciales*. España: Thomson-Aranzadi. See also article 108 of the Statute of Rome (ICC).

⁸⁷ République Du Senegal, Cour d'Appel de Dakar, Chambre d'Accusation, Arrêt n° 135 du 04-07-2000.

⁸⁸ Article 79 of the Constitution of Senegal provides: "The treaties or agreements regularly ratified or approved have, on their publication, an authority superior to that of the laws, subject, for each treaty or agreement, to its application by the other party."

⁸⁹ Its article 5.3 opens the door to the application of the Universal Jurisdiction.

⁹⁰ Established by this convention.

⁹¹ Senegal Government. *Initial report of Senegal to the Committee against Torture*, U.N. Doc. CAT/C/5/Add.19, 15 January 1990, p. 93. [Date of search: March, 2007]. Available in: <http://www.hrw.org/>

to decide in connection to a crime of torture committed abroad, by one of its nationals, against a foreign population. This sentence was based on the high level of legal security required by International law. In the same way, the Strasbourg Court, in the *Bankovic* case assumed a territorial concept in relation to its jurisdiction, keeping away from the jurisprudence previously established in the case *Cyprus v. Loizidou*.⁹²

iii. Several countries have developed a different judicial classification in connection with the universal jurisdiction or they do not include all the typologies gather in the Statute of the International Criminal Court of Justice.⁹³ This is the case of the United Kingdom and the United States of America in relation with the torture.⁹⁴

iv. The influence of political aspects could be appreciated in different fields⁹⁵. First, some domestic legislations required the previous intervention of political bodies to apply the universal jurisdiction.⁹⁶ A special case is represented when the public prosecution depends from the government and, at the same time, the judges lack the capacity to initiate legal actions. The inexistence of *popular action*⁹⁷ and other similar figures

backgrounder/africa/chad1205/2.htm *Le juge répressif sénégalais est en principe incompétent pour connaître des infractions commises à l'étranger par un étranger qui vient se réfugier chez nous. D'autant que n'étant pas un national sénégalais, le délinquant peut toujours être livré à l'autorité étrangère qui demanderait son extradition. Cette incompétence du juge sénégalais souffre cependant de deux exceptions. D'une part, quand la sûreté de l'Etat ou son crédit sont en jeu, le juge sénégalais va intervenir sans considérations de la nationalité du coupable, du lieu où son infraction a été commise. D'autre part, lorsque l'infraction commise à l'étranger par un étranger lèse les intérêts de la communauté internationale. Ici se pose le principe de la compétence universelle prévue dans quelques conventions internationales auxquelles le Sénégal est partie, conventions relatives notamment au trafic des stupéfiants, au faux-monnayage et en dernier lieu la convention contre la torture.*

⁹² The European Commission of Human Rights and the European Court of Human Rights have exercised jurisdiction concerning acts committed by states members outside their territory or committed in their territory but have produced effects outside of them.

⁹³ The Pinochet case deals a similar matter in connection with the kidnapping.

⁹⁴ Continuing Controversy regarding Secret U.S. Rendition and Detention Practices. The American Journal of International Law, Vol. 100, No. 1. (Jan., 2006), 232 at 236. "Vice President Richard Cheney and his staff have been active in opposing the legislation and have worked to exempt the Central Intelligence Agency from its coverage, voicing particular criticism of the concept of "cruel and inhuman treatment" as subjective and unrealistic".

⁹⁵ See *Monseñor Oscar Arnulfo Romero and Galdamez v. El Salvador*, Case 11.481, Informe N° 37/00, Inter-Am. C.H.R., OEA/Ser.L/V/II.106 Doc. 3 rev. en 671 (1999).

⁹⁶ See Amnesty International in <http://web.amnesty.org/pages/uj-index-eng> "The United Kingdom has required that the Attorney General, a political official, approve a prosecution in England and Wales of a person suspected of torture. (23) The failure of the Attorney General to approve a prosecution of former President Augusto Pinochet during the year and a half that he was in England from 1998 to 2001 led to a perception that the failure to do so was based on political, not legal, considerations".

⁹⁷ The popular action gives legal action to a person without the necessity to allege personal interest or damage, but in defense of the legality.

could be also considered as an important barrier for the development of the universal jurisdiction.

v. The preparation of national judges on this topic could be insufficient. This matter comes up when the *House of Lords* approached the Pinochet case. As a result, the tribunal allows the procedural intervention, as *amicus curiae*, of Amnesty International and Human Rights Watch.⁹⁸

vi. Other technical aspects could be present: lack of cooperation on foreign States, difficulties in the acquisition of evidence, existence of unjustified delays in the detention of supposed criminals, absent of extradition agreements...

Both, in national and international initiatives, there are two circumstances that, in some cases, have frustrated the exercise of the universal jurisdiction: the prescription terms⁹⁹ and the promulgation of amnesty norms. In relation with the first category, the Belgian jurisprudence has declared the imprescriptibility of this kind of crimes.¹⁰⁰

Prescription does not seem to be a principle of international criminal law and appears to be irreconcilable with the character of the offences... Their imprescriptibility is inherent in their nature. Therefore, we find that, as a matter of customary international law, crimes against humanity cannot prescribe and that this principle is directly applicable in the domestic legal order.

In relation with amnesty norms, the international community has developed a doctrine that marginalized their application. In this context, the peace agreement promoted between the United Nations and the Sierra Leona government excluded, in its article IX, the possibility to give pardon when the crime was related to genocide, crimes against humanity, war crimes and serious violations of the International Humanitarian law. At the same time, the jurisprudence of the Interamerican Court of Justice has declared the illegality of these norms in Argentina¹⁰¹ and Chile.

⁹⁸ See *Christine M. Chinkin*. The American Journal of International Law, Vol. 93, No. 3. (Jul., 1999), 703 at 711. In *Re Pinochet*. United Kingdom House of Lords. *Regina v. Bow Street Stipendiary*. Magistrate ex parte Pinochet Ugarte (No. 3). [1999] 2 WLR 827.

⁹⁹ As a consequence of the principle of legality.

¹⁰⁰ See *re Pinochet* - Belgian Tribunal of First Instance Brussels, 93 Am. J. Int'l L. 700, 703 (1999). In <http://web.amnesty.org/library/index/engior530172001?OpenDocument>

¹⁰¹ See Ayala Corao, Carlos M. *Las Consecuencias de la Jerarquía Constitucional de los Tratados relativos a Derechos Humanos*. Ex Presidente de la Comisión Interamericana de Derecho. p.19. [Date of search: March, 2007] Available in: <http://www.internationaljusticeproject.org/pdfs/Ayala-speech.pdf>

The other impediment that limits the enforcement of universal jurisdiction lies in the application of doctrines related to the sovereign immunity. One more time, comparative law finds contradictions in this field. On the one hand, in the Pinochet case the *House of Lords*, considered that in relation with the immunity of a head of State is necessary to make a distinction between official and non official acts, in addition, international customary law should be the source to determinate this criterion.¹⁰² On the contrary, the International Court of Justice in the case *Democratic Republic of the Congo v. Belgium*,¹⁰³ has recognized the sovereign immunity of a Foreign Affairs Minister when it established... *that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity... While jurisdictional*

¹⁰² See Christine M. Chinkin. The American Journal of International Law, Vol. 93, No. 3. (Jul., 1999), 703 at 711. "The majority concluded that the immunity of a former head of state persists only with respect to acts performed in the exercise of the functions of head of state, that is official acts, whether at home or abroad." The determination of an official act must be made in accordance with customary international law.^{2g} The question was therefore whether "international crimes in the highest sense," such as torture, can ever be deemed to be official acts of a head of state.³⁰ This question required consideration of the parallel strands of the substance of international crimes and jurisdiction for their prosecution, and, in particular, the obligations incurred by the parties to the Torture Convention, "which lies at the heart of the present case."... The majority of the Law Lords found that torture cannot constitute an official act of a head of state. Accordingly a former head of state cannot successfully claim immunity therefor, irrespective of any purported waiver by the state".

¹⁰³ See Case Concerning the Arrest warrant of 11 April 2000, *Democratic Republic of Congo v. Belgium*. International Court of Justice. 14 February 2002. General List No. 121. 60. The Court emphasizes, however, that the immunity from jurisdiction enjoyed by incumbent Ministers for Foreign Affairs does not mean that they enjoy impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law. Jurisdictional immunity may well bar prosecution for a certain period or for certain offences; it cannot exonerate the person to whom it applies from all criminal responsibility. 61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances. First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law. Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity. Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity. Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include the International Criminal Tribunal for the former Yugoslavia, and the International Criminal Tribunal for Rwanda, established pursuant to Security Council resolutions under Chapter VII of the United Nations Charter, and the future International Criminal Court created by the 1998 Rome Convention. The latter's Statute expressly provides, in Article 27, paragraph 2, that "[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person."

immunity is procedural in nature, criminal responsibility is a question of substantive law. The Statute of Rome with regard to the operation of the International Criminal Court, in its article 27.2, disables this differentiation, recognising the competence of the court for all cases¹⁰⁴.

III. THE DEVELOPMENT OF ENFORCEMENT MECHANISMS BY THE INTERNATIONAL INSTITUTIONS SPECIALIZED IN HUMAN RIGHTS

Since the creation of the Organization of the United Nations there has been adopted, approximately, ninety-three relevant documents related with human rights.¹⁰⁵ To these efforts, it should be add the important achievements reached in the sphere of the European Council, the African Union and the Organization of American States. Unfortunately, the adoption of international instruments contrast with the lack of enforcement mechanisms developed for the fulfilment of their resolutions. This situation is consequence of several causes:

- a. From an universal point of view, only the Security Council of the United Nations has the power to adopt coercive measures in cases of threat to the peace, breach of the peace, or act of aggression.¹⁰⁶ In a regional sphere, only the Interamerican Court of Human Rights recognises the possibility to enforce, through an internal process, the compensatory elements of its sentences.¹⁰⁷ Concerning this issue, a special case is represented by article 88 of the Statute of the International Criminal Court.

¹⁰⁴ Other international instruments with similar norms are; *Article IV of the Convention for the Prevention and Punishment of the Crime of Genocide* (1948); *Principle III of the Principles of Law Recognized in the Charter of the Nuremberg Tribunal and the Judgment of the Tribunal* (1950), *Article 3 of the UN Draft Code of Offences against the Peace and Security of Mankind* (1954), *Article III of the Convention on the Suppression and Punishment of the Crime of Apartheid* ("individuals . . . and representatives of a State"), *Article 7 (2) of the 1993 Statute of the International Tribunal for the former Yugoslavia*, *Article 6 (2) of the 1994 Statute of the International Criminal Tribunal for Rwanda* and *Article 7 of the UN Draft Code of Crimes against the Peace and Security of Mankind* adopted in 1996, as well as in *Article 27 of the Statute for the International Criminal Court*, adopted in Rome on 17 July 1998 by a vote of 120 in favor to only seven against, with 21 abstentions).

¹⁰⁵ See United Nations High Commissioner for Human Rights web page in http://www.unhchr.ch/spanish/html/intlinst_sp.htm

¹⁰⁶ See articles 39 at 51 of the United Nations Charter.

¹⁰⁷ See Article 68 of the American Convention of Human Rights.

- b. In general terms, the obligatory character of the resolutions adopted by judicial international bodies is recognized.¹⁰⁸ However, if a State decides not to fulfil one judgment it will be merely under international responsibility. Case law has demonstrated that this situation is not infrequent.¹⁰⁹
- c. In some cases, as the observations made by the special committees established by the main international human rights conventions adopted by the United Nations¹¹⁰ or the resolutions of the African Commission on Human and People's Rights, is only recognized a recommendation value.¹¹¹ The doctrine has not clarified if it could be possible to incur in international responsibility even if this acts are not *obligatory* to the states.¹¹² The fact that some of the precepts that are involved have the consideration of *jus cogens*, as well as the prestige of several of the already mentioned institutions, could construct theories that gives them this condition.

Because of these circumstances, the mechanisms used to implement international law have had an indirect character.¹¹³ For example, in the framework of the process 1235; the publicity of a debate can produce

¹⁰⁸ See Article 46 of the European Convention on Human Rights, as well as Article 59 of the Statute of the International Criminal Court.

¹⁰⁹ See Council of Europe. *Parliamentary Assembly Resolution 1516 (2006). Implementation of judgments of the European Court of Human Rights*. [Date of search: March, 2007]. Available in: <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta06/ERES1516.htm> "The Assembly's Committee on Legal Affairs and Human Rights has now adopted a more proactive approach and given priority to the examination of major structural problems concerning cases in which unacceptable delays of implementation have arisen, at this moment in five member states: Italy, the Russian Federation, Turkey, Ukraine and the United Kingdom. Special in situ visits were thus paid by the rapporteur to these states in order to examine with national decision makers the reasons for non-compliance and to stress the urgent need to find solutions to these problems. The issue of improving domestic mechanisms which can stimulate correct implementation of the Court's judgments was given particular attention. 6. In eight other members states – namely Bulgaria, France, Germany, Greece, Latvia, Moldova, Poland and Romania – reasons for non-compliance and possible solutions to outstanding problems have been considered, making use of written contacts with these countries' delegations to the Assembly".

¹¹⁰ See Article 5.1 of the optional protocol of the Covenant on Civil and Political and Article 22.5 of the Convention against Torture and other Cruel and Inhuman Treatments.

¹¹¹ The *African Commission on Human and Peoples' Rights*, in Article 120 of its Statute, recognizes the possibility to made observations concerning the communications received. This body enjoys of capacity of action before the African Court of Justice, having its resolutions a compulsive value. –see article 30 of its protocol–.

¹¹² See Draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001). Some articles deal with this subject: For instance, Article 12 and Article 13.

¹¹³ Alston, Philip y Steiner, Henry J. *International Human Rights in Context. Law, Politics, Morals*. United States: Oxford University Press, 2ª ed. 2000. 620 at 621.

a feeling of shame in a State; an initiative can initiate bilateral or multilateral actions by other countries; it is possible to move a draft of resolution; the president of the Human Rights Commission can make an exhort. On the other hand, it is possible to provide assistance services; request more information from a State; approve a resolution criticizing the government and requesting the adoption of specific measures; appoint a special reporter or group that could analyze the situation; request from the Secretary General the appointment of a special representative; request to the Security Council the adoption of sanctions and other punitive measures.

This legal structure shows the existence of several tensions inside International Law. A representative example is the pressures made, with the object to slow down the operation of the recently created International Criminal Court,¹¹⁴ through the negotiation of bilateral agreements under the sphere of article 98 of the Rome Statute.¹¹⁵

In this context, the main query tries to find out if the present system established for the protection of human rights is the most suitable or is merely the consequence of the evolution of the international relations, influenced by multitude of social, political and economic elements. In

¹¹⁴ See USA for the International Criminal Court. *U.S. and "article 98" agreements. How does this effort tie in with the larger US offensive against the Court?*. [Date of search: mayo 2005] Available in: (http://www.usaforicc.org/facts_art98.html) On May 6, 2002, Marc Grossman, US Under Secretary of State for Political Affairs, announced that the current administration no longer considered itself bound by the US signature of the Rome Statute and did not intend to ratify the treaty. In May 2002, the US first threatened to destabilize UN peacekeeping operations by promising to veto the UN mission in East Timor unless its military personnel were granted immunity from the ICC; the operation was renewed without such a provision. (The US has now succeeded in getting East Timor to sign a so-called "Article 98" agreement.) On 12 July, the US obtained a one-year renewal exemption in the context of the Security Council debate on the UN mission in Bosnia-Herzegovina as indicated above. On 2 August, the last day before US Congressional summer recess, President Bush signed the American Servicemember's Protection Act, which authorizes the withdrawal of US military assistance from certain non-NATO allies supporting the Court, but also includes broad Presidential waivers...US pressure on countries to support its so-called "Article 98" agreements intensified in mid-August 2002 when US officials, including Pierre-Richard Prosper, US Ambassador at Large for War Crimes Issues, indicated that the US relationship with NATO would change should the US government fail to achieve its goal to secure broad non-extradition agreements. It has furthermore been reported that States seeking entry into NATO may be refused entry on the basis of a failure to sign a so-called "Article 98" agreement, although US officials are publicly denying this.

¹¹⁵ See Council of the European Union. *Conclusions of the Council of the European Union on the ICC*. Brussels, 30 September 2002. See also http://en.wikipedia.org/wiki/United_States_and_the_International_Criminal_Court United States and the International Criminal Court. *The U.S. claims that American soldiers and political leaders are at risk of "frivolous or politically motivated prosecutions" (a form of **barratry**). American troops and civilians are active in over 100 countries in the world and are therefore in a uniquely vulnerable position. **Anti-Americanism** is common throughout the world and is also reflected in other independent bodies within the **United Nations** system. There is no mechanism within the court for the United States to effectively control an independent prosecutor who pursued such an agenda.*

this sense, some recent researches associate the ratification of international instruments on this field with the different human rights practices.¹¹⁶ In this line, authors as Oona Hathaway consider that *International actors rewards ratifying states by reducing political pressure to promote human rights standards, thereby increasing human rights violations*. Some factual data support this statement; on the one hand, the promulgation of the Charter on Fundamental Rights has been followed by the adoption of a multiplicity of treaties that repeat its content in specific fields. This profusion of norms has created an administrative magma that dilutes the efficiency of its effective realization. On the other hand, the operation of the United Nations Human Rights Commission, in words of its Secretary General,¹¹⁷ has served to *States have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others*. Finally, the controls mechanisms that have given publicity to human rights violations occurred in some countries, have not avoid the development of dramatic situations as the one happened in Darfur.

The answer to this question probably could be find in the persistence of the same problems that International Human Rights Law confronted at the moment of the approval of the United Nations Charter, its relegation to a secondary sphere in relation with the maintenance of international peace. That is to say, its international relevance whereas affects external circumstances of the States. Moreover, the development of mechanisms of action from the framework of the international cooperation has promoted the implementation of an assistant approach. This financial attitude avoids confronting, in several cases, the structural problems that human rights faces.

IV. CONCLUSIONS

The incorporation systems of International Human Rights Law in domestic jurisdictions are operating under the influence of the interests of the States. This situation has a direct impact on the uniform application of its content.

¹¹⁶ See Goodman, Ryan and Jinks, Derek. *Measuring the effects of human rights treaties*. EJIL- The European Journal of International Law. 2003, VOL 14 N.1 171-183.

¹¹⁷ Secretary-General of the United Nations, Report. *In larger freedom: towards development, security and human rights for all*. United Nations General Assembly Fifty-ninth session Agenda items 45 and 55 A/59/2005, 21 de March de 2005. p 45.

First, the distinction between monist and dualist systems tends to be attenuated. On the one hand, systems traditionally regarded as dualist has evolved till be considered as monist -direct allegation-, remaining as a differentiator element the hierarchy position -*infralegal*- of International Human Rights Law in the domestic jurisdictions. On the other hand, most monist systems have turn into dualist systems in the sense that an international norm cannot contradict the content of a constitutional disposition¹¹⁸. In this field, the use of the self-executing concept, by the monist systems, responds to dualist considerations, with the singularity to give more importance to the judiciary.

Second, the regional systems developed for the protection of human rights are promoting the use of monist incorporation mechanisms in the framework of their competences. Under these circumstances, there have not been established national hierarchy concepts in case that different international institutions maintain contradictory positions about one issue or deal with the incorporation of customary *jus cogens* norms.

Third, it is necessary to develop mechanisms that guarantee the judicial control on the incorporation process of international human rights law in domestic jurisdiction. With regard to the capacities of parliaments and governments, it should be created legal doctrines that restrict the power to denounce international treaties or resort to the indirect method of promulgation of constitutional or legal amendments that achieve this objective.

Fourth, the development of norms connected with the universal jurisdiction in national legal systems, requires more international coordination efforts that assure the observance of the principle of legal security.

Finally, from an international perspective, the normative profusion developed in the sphere of International Human Rights Law during the last decades, is consequence of the lack of effective enforcement mechanisms inserted in the international treaties. This circumstance favours that it has lost its natural character, diluting its effects in a tangle of institutions. For this reason, this body of norms are used, in several cases, as evidence of actions undertaken under the political, economic and social considerations of the international relations.

¹¹⁸ Because is necessary to make a constitutional amendment it is not merely a problem of legal hierarchy.

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